UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

S. FREEDMAN & SONS, INC.
and
DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Case(s): 05-CA-121221
05-CA-132227
05-CA-138025

Brendan Keough, Esq. for the General Counsel.
Scott Kamins, Esq. (Offit Kurman), Maple Lawn, MD for the Respondent.
Lauren P. McDermott, Esq. (*Mooney, Green, Saindon, Murphy, & Welch, P.C.*), Washington, DC, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on January 21-23 and 26, 2015. The complaint is based on timely-filed charges by the Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters (the Union) alleging that S. Freedman & Sons, Inc. (the Company) violated Sections 8(a)(1), (3) and (4) of the National Labor Relations Act (the Act)[1] by retaliating against employee and union steward Richard Saxton by suspending and terminating him because of his membership in and activities on behalf of the Union, and for his participation in charges filed against the Company with the National Labor Relations Board (NLRB). Additionally, the complaint alleges that the Company unlawfully restricted Saxton's Section 7 rights by conditioning his reinstatement on a confidentiality agreement that precluded him from discussing his discipline and the related grievance settlement. The Company denies the allegations and alleges that the discipline was appropriately issued in response to Saxton's misconduct and Saxton waived his rights by signing a narrowly tailored confidentiality agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and the Company, I make the following

[1] 29 U.S.C. §§ 151-169.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, provides paper products and maintenance supplies from its facility in Landover, Maryland (the facility), where it annually sells and ships goods valued in excess of $50,000 directly to points located outside the State of Maryland. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company

The Company delivers paper and restaurant products to hospitality providers from its facility to customers from Newark, Delaware to Tidewater, Virginia. It has approximately 135 employees, including 25 truck drivers and 30 warehousemen. The facility includes a warehouse, which includes administrative offices, an adjacent parking lot, and leased delivery trucks.

The Company's owner, Jeff Freedman, has delegated oversight responsibility for the Company warehouse and delivery operations, and collective bargaining operations to James Thompson, vice president of finance and operations. Meg Phillips, the Company's human resources director, reviews disciplinary decisions for compliance with applicable regulations and prepares the applicable documentation. In the end, however, she essentially implements Thompson's determinations. Ellis Brown, as transportation supervisor, oversees the delivery truck drivers. Joe Smith, the warehouse manager, is responsible for the daily operations of the warehouse.[2]

B. Richard Saxton

Richard Saxton, the discriminatee, was employed 26 years by the Company as a truck driver delivering Company products to customers. In that capacity, he possessed a commercial driver's license from the State of Maryland.[3]

At the time of his termination on October 2, Saxton was the most senior truck driver. After clocking in, Saxton typically started his shift by picking up his customer manifest, truck keys and Company cellular telephone from the warehouse area. After inspecting his vehicle and completing an inspection report, Saxton would exit the facility and start his delivery route. Upon finishing his delivery route, Saxton returned to the facility. After preparing his truck for the next work day by cleaning, refueling and restocking it, Saxton took the manifest to Crystal Moore, the

[2] The weight of the credible evidence strongly suggests that Thompson, with Freedman's approval, usually makes the final determinations in disciplinary matters. (Tr. 330-331, 343-344, 560-562, 571.)

[3] There is no evidence to dispute Saxton's credible testimony that he consistently maintained a valid driver's license while employed by the Company. (Tr. 123-124.)

accounting clerk. Her window was located next to the transportation office where Brown, Saxton's immediate supervisor, was situated. After she approved it, Saxton clocked out.[4] He frequently worked overtime beyond the end of his shift at 2:15 p.m.[5]

C. The Union

The Union has been the exclusive bargaining representative of the Company's drivers and warehousemen for approximately 50 years. The current collective-bargaining agreement, (CBA) is effective from March 1, 2013 to February 28, 2017.[6]

Tommy Ratliff is the Union's president. Wayne Settles, the Union's business agent for the Company's drivers and warehousemen, represents the bargaining-unit in contract negotiations and grievances. For the past several years, Saxton, Antwoine Drayton and Henry Davis served as the Union shop stewards. In that capacity, they filed grievances, and participated in grievance meetings and contract negotiations. Saxton was the senior steward, having served for nearly 17 years. He filed approximately seven grievances a year and most recently participated in bargaining during February 2013.[7]

D. The October 25th Suspension

The downward spiral in Thompson's relationship with the Company began on October 25, 2013,[8] when Thompson suspended him for refusing to obey a supervisor's order.[9] The suspension notice stated Saxton violated rule 2(h). Rule 2(h) of the bargaining-unit work rules authorizes termination for refusing a supervisor's order.[10] Saxton filed a grievance regarding his suspension and a grievance meeting was scheduled for November 18.[11]

E. The November 18th Termination

Prior to the November 18 grievance meeting, Saxton was involved in an accident while driving a Company truck. He was issued a citation for following too closely and a court date was scheduled for January 23.[12] The case was resolved with no points assessed, but the citation remained on Saxton's driving record.[13]

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[4] Thompson expressed his concerns with Settles at the time about the amount of time that Saxton took before starting his route and after completing it. (Tr. 496-497.)

[5] The CBA defines overtime as work performed in excess of an 8-hour shift. (GC Exh. 2 at 6.)

[6] GC Exh. 2.

[7] Saxton had extensive involvement as a steward, but there is no evidence of preexisting animosity between him and management. (Tr. 61-66.)

[8] All dates are between October 25, 2013 and October 2, 2014, unless otherwise indicated.

[9] GC Exh. 7.

[10] GC Exh. 3 at 2.

[11] GC Exh. 8.

[12] R. Exh. 2.

[13] Saxton conceded that the infraction remains on his record. (Tr. 237-238, 300-301, 642-645; GC Exh. 17; R. Exh. 2.).

On November 11, Thompson issued Saxton a pending investigation letter concerning his accident.[14] The investigation letter refers to section 1(a) of the bargaining-unit rules which states that a driver could be terminated if damages exceed $2,000.[15] Shortly before the November 18 grievance meeting, Thompson received a damage estimate for Saxton's accident indicating damage to the other vehicle in excess of $2,000.[16]

On November 18, Saxton, accompanied by Settles, met with Thompson and Phillips for a scheduled meeting relating to his grievance of the October 2013 suspension for disobeying a supervisor's order. Thompson changed course at the beginning of the meeting, however, by informing Saxton and Settles that he was going to address Saxton's November accident. Thompson said the damages exceeded $8,000 and he was inclined to terminate Saxton. However, Thompson offered to forego such drastic action if the Union agreed to withdraw several unrelated arbitrations involving other employees. Saxton and Settles refused the offer, with Settles insisting that he would address each grievance separately. Thompson responded by informing Saxton that he was terminated. Saxton asked Thompson if Freedman knew about this action. Thompson said Freedman approved Saxton's termination.[17] On November 19, Saxton received a termination notice,[18] making him the first employee ever terminated by the Company as a result of a motor vehicle accident.[19]

After Saxton left the meeting, he immediately went to Freedman's office and informed him that Thompson fired him after Settles refused to settle pending unrelated arbitrations. Freedman, who was unaware that Saxton had been terminated, spoke with Thompson and, later that afternoon, called Saxton and arranged a meeting with him and the Union for the following day. The next morning, Saxton met with Freedman and Phillips. They discussed Thompson's recent change of work rule 3(c), which indicates the amount of time a driver has to start his delivery route.[20] Then they discussed Thompson's offer to reduce Saxton's termination in exchange for the Union withdrawing arbitrations. Freedman suggested Saxton speak to the Union about setting up a meeting between the Company and the Union to discuss the pending arbitrations. Saxton declined, but suggested Freedman call the Union about the arbitrations.[21]

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[14] GC Exh. 9.

[15] The Company subsequently modified bargaining-unit work rule 1(a) by increasing the damage amount to $5,000. (GC Exh. 3 at 1.)

[16] The General Counsel contests Thompson's estimate of $9,000 in damages, but Saxton did not deny that they exceeded $2,000. (GC Exh. 9; R. Exh. 3; Tr. 240-241, 643-648, 674-676.)

[17] I credit the fairly consistent and credible versions by Settles and Saxton of this meeting over that provided by Thompson. (Tr. 69-73, 87-90, 259-269, 484-487, 533-536.) Thompson conceded that other grievances were discussed, but denied offering to reduce Saxton's termination in exchange for the Union withdrawing pending arbitrations. The notion that Thompson terminated Saxton and then discussed other grievances while Saxton was still there was not credible. (Tr. 674-677.)

[18] GC Exh. 10.

[19] The Company concedes the disparity in its lesser discipline of Gregory Johnson for a previous accident exceeding $5,000 in damages, but distinguishes it on the basis that Johnson was a supervisor and not subject to the CBA. (GC Exh. 32; Tr. 579-580.) Johnson was subsequently involved in another motor vehicle accident, but was discharged only after failing a drug test. (GC Exh. 33.)

[20] GC Exh. 3 at 3.

[21] This finding is based on Saxton's credible and undisputed testimony. (Tr. 90-100.)

On November 20, with Saxton waiting outside, Settles met with Freedman in Phillips' office. Settles told Freedman he would not withdraw pending arbitrations in exchange for Saxton's reduced discipline. Referring to his affinity for Saxton, as well as his longtime relationship with the Company, Freedman indicated that the termination resulted from a misunderstanding and would get back to him. The next day, after speaking with Settles and Ratliff, Freedman agreed to reinstate Saxton on November 22 and provide him with gift cards as compensation for any lost income.[22]

F. The November 25th Confidentiality Agreement

Saxton reported to work on November 22. Before clocking in, however, Thompson handed him a last-chance agreement and said that Saxton needed to sign it before he could be reinstated. Saxton was familiar with such agreements, having previously signed similar documents as a steward. As such, he expressed surprise that the agreement was not already signed by a Union representative. Thompson reiterated that Saxton could not return to work unless he signed the document. Saxton left the facility and informed Settles, who was did not know about the agreement. Saxton then called Freedman and asked if he was aware of the agreement. Freedman was also unaware of it, but told Saxton to return the next work day.[23]

At some point later that day, Ratliff and Settles called Freedman. Freedman proposed to convert Saxton's discipline to a suspension for time served if he signed an agreement not to discuss the terms of his reinstatement. Ratliff agreed to consider such an agreement, but wanted to review it first. Rather than provide a draft to the Union, however, Thompson surprised Saxton with a confidentiality agreement when he returned to work on November 25. Although Settles had not yet seen the confidentiality agreement, Saxton signed the document and returned to work.[24] The agreement stated:

> I, Richard Saxton, have entered into an agreement this day, November 25, 2013 with S. Freedman & Sons (the Company) regarding my return to work after my termination on Tuesday, November 19, 2013.
>
> I have accepted a suspension of four days in lieu of my termination as a result of my accident on November 8, 2013. By accepting this suspension I waive my right to file a grievance against the Company regarding this termination or suspension.
>
> I also understand and agree that this resolution is a one-time agreement and is not precedent setting.

[22] This finding is based on Settles' credible testimony. (Tr. 488-491, 531-541.)

[23] This is a rare instance in which Freedman and Thompson were not on the same page. (Tr. 101-107, 241-244, 492-493.) Moreover, given the subsequent interaction between Settles and Freedman about the last-chance agreement, I did not credit Thompson's testimony that he told Settles about such a document before presenting it to Saxton. (Tr. 648-650, 654-656; GC Exh. 12; R.Exh. 4.)

[24] Settles confirmed discussing the agreement with Freedman, but there is no credible evidence that he was shown the document before it was presented to Saxton. Moreover, Thompson's denial of knowledge as to the source of the agreement further detracted from his credibility. (Tr. 107-109, 249, 491-493, 542-546, 551; GC Exh. 61.)

> I understand and agree that the terms of this agreement will remain confidential and that any disclosure of this Agreement may lead the Company to take disciplinary action against me, up to and including the termination of my employment, even if I do not personally benefit from the violation. I understand and agree that if I breach this Agreement, the Company reserves the right to avail itself of all legal or equitable remedies to prevent the impermissible use of Confidential Information or to recover damages incurred as a result of the impermissible use of Confidential Information.[25]

G. The December 20th Warning

On December 20, Saxton had just returned to the yard at the end of his shift and was met by Brown, who proceeded to issue Saxton a verbal warning for failing to clock-out immediately at the end of work the previous day in violation of work rule 4(c). The warning stated that Saxton returned to the warehouse at 4:42 p.m. and clocked-out 1 hour and 40 minutes later.[26] Bargaining-unit work rule 4(c) sets forth the Company's discipline for, "failure to begin work immediately upon clock-in; or to clock-out immediately at the end of work."[27] This was the first instance, however, in which a Company driver had ever been disciplined for delay in clocking-out at the end of a shift.[28]

On December 27, Saxton filed a grievance over the December 20th verbal warning.[29] During the January 6 grievance meeting with Thompson and Philips, Saxton, accompanied by Settles, attributed the departure delay on December 19 to the significant wait time to refuel and attending, at the request of an unspecified supervisor, a disciplinary meeting relating to a coworker. Thompson did not accept Saxton's explanation and the grievance was not resolved.[30]

H. The Union Files Charges

On January 24, the Union filed charge 05-CA-121221 with Region 5 of the NLRB alleging the Company violated Section 8(a)(3) and (1) by disciplining Saxton on December 20 due to his union activities.[31] On January 27, the Company received the charge.[32] On March 28, the Union amended that charge to include allegations relating to the November 18th refusal to

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[25] GC Exh. 13.

[26] GC Exh. 14.

[27] The General Counsel contends that neither the bargaining-unit work rule, nor the collective bargaining agreement, identify the amount of time a driver has to clock-out "at the end of work." (GC Exh. 2; 3 at 6.) However, based on Saxton's explanation, the last task before clocking out is handing in the manifest.

[28] Saxton's warning was one of 14 issued to drivers for violating similar work rules between October 2013 and August 2014. Two verbal warnings were issued prior to December 20, while 12 warnings were issued after that date. Saxton's warning pursuant to work rule 4(c) was unique, however, since it dealt with a delay in clocking-out at the end of the day. The other 13 warnings pertained to work rules 3(b) and (c), which address delays in *starting* one's shift after clocking in. (R. Exh. 5-6; 572-574, 659-661.)

[29] GC Exh. 15.

[30] This finding is based on the undisputed testimony of Saxton and Settles. (Tr. 111-112, 117-118, 495-497, 573.)

[31] GC Exh. 1(A).

[32] GC Exh. 1(B) at 3.

rescind Saxton's termination unless the Union withdrew unrelated grievances and arbitrations, and the Company's November 25th requirement that Saxton sign a confidentiality agreement.[33] On March 31, the Company received the amended charge.[34] On April 25, Region 5 issued a complaint based on the aforementioned charges, with notice of hearing for July 8.[35] Freedman, Thompson, and Phillips were subpoenaed to testify by counsel for the General Counsel.[36]

I. Saxton Accused of Driving with an Expired License

One week before the hearing, Thompson saw an opportunity to retaliate. On July 1, Saxton called Ernest Henson, a supervisor, at approximately 4:30 a.m. and left a voicemail message that he was taking off "to get a license."[37] The message was conveyed to Brown, who proceeded to inform Thompson. Brown, who keeps copies of licenses on file, also shared that he reminded Saxton several months earlier, prior to going out on medical leave, about renewing his driver's license prior to June 27. Thompson immediately decided to investigate.[38]

Brown's report to Thompson omitted the fact that he did not follow up with Saxton about his driver's license at any time after the latter returned from medical leave on June 9. Had Brown followed up, he would have learned that Saxton renewed his driver's license on June 4. In any event, after calling out on July 1, Saxton proceeded to get a "duplicate" license from the Maryland Department of Motor Vehicles and called Brown to let him know. Brown suggested that Saxton's license expired on June 27, but Saxton denied it.[39]

On July 2, Saxton arrived at the facility but, before he could start his shift, Thompson pulled him into a meeting with Phillips and Drayton, acting as his steward. Saxton was immediately handed a written warning for calling out on July 1 without sufficient leave time. Thompson then asked Saxton why he called out on July 1. Saxton said he had to get a license. Thompson said Brown told him Saxton's license expired. Saxton denied that and explained that he lost his license. Thompson asked Saxton when he realized he lost his license. Saxton explained that he realized on June 30 that he lost his license, but denied ever driving a Company truck on an expired license. He insisted that he was merely obtaining a duplicate license to replace the one he lost. Thompson accused Saxton of lying.[40]

Saxton denied lying, but Thompson's persistent accusations took Saxton over an emotional edge. He slammed the table and capitulated, stating that if Thompson insisted Saxton

[33] GC Exh. 1(C).
[34] GC Exh. 1(D) at 3.
[35] GC Exh. 1(E)-(F).
[36] Freedman, Thompson and Philips knew that the case involved Saxton. (Tr. 39, 360, 569.)
[37] There is no dispute regarding the message that Saxton left for Brown. (Tr. 124-125, 128-132, 209.)
[38] Notwithstanding Brown's alleged concern, there is no indication he attempted, on June 30, to ascertain whether Saxton drove on an expired license that day. (Tr. 623, 663, 667, 800-803, 815.)
[39] The motor vehicle record of the June 4 renewal provides critical corroboration of Saxton's assertion that he lost his license sometime after June 27. Construing the "duplicate" designation any other way does not make sense since it is incomprehensible that an expired license would be duplicated as opposed to simply renewed. (Tr. 123, 132-133, 135; GC Exhs. 17 at 5, 19-20, 52.)
[40] Thompson and Phillips confirmed testimony by Saxton and Drayton that Saxton initially maintained that his license never expired. (136, 138, 211, 227, 341, 393-397, 440, 617, 620, 664.)

was lying and the license expired, then the accusations must be true. Saxton then refused to say anything further and referred Thompson and Phillips questions to Drayton.[41]

Drayton then provided Thompson and Phillips with Saxton's license and explained the D-1, or duplicate, designation.[42] However, Thompson and Philips refused to concede its validity as proof that Saxton's license had not expired prior to July 1. They followed up on that allegation by obtaining a copy of Saxton's driving record, which also confirmed that his CL license was renewed on June 4 and he was subsequently issued a duplicate license on July 1.[43]

After the meeting, Saxton drove his route. Later that day, Drayton again attempted to explain to Thompson the various codes on Saxton's Virginia driver's licenses, including the meaning of a "D" as a duplicate. Thompson, still focused on Saxton's frustrated remark that the license had expired on June 27, did not want to hear it.[44]

J. The July 3rd Termination

Notwithstanding the documentary proof provided by Saxton and Drayton on July 2, Thompson was determined to capitalize on Saxton's remark at the meeting. As Saxton arrived at work on July 3, Thompson handed him a letter terminating his employment:

> On Wednesday, July 2, 2014, we met with you regarding your call out on Tuesday, July 1, 2014. During this meeting, you claimed that you called out because you needed to obtain a new license. When questioned further, you acknowledged that although you had been notified by the Company, as a courtesy, of the need to renew your license weeks ago, you had not done so, and it had expired on June 27, 2014. You admitted that, even though your license expired on June 27, and it was thereafter illegal for you to drive, you nevertheless ran your company route in your company truck on June 30, 2014, without a valid driver's license. This was a violation of applicable law, and exposed the company (not to mention you) to serious penalties. This is considered a major offense….
> Work rule 6(h) provides that the penalty for any combination of two (2) major offenses in an eighteen (18) month period is termination. In your case, the most recent infraction is

[41] Notwithstanding Saxton's rambling response that state law afforded drivers seven days after a license expires to get one, (Tr. 217-218.), it was evident that he made the alleged concession out of frustration and feeling insulted, he deferred to Drayton for the remainder of the discussion. (Tr. 139, 213, 305, 398, 442-444, 452.) Drayton initially testified that he did not hear the remark, but later conceded on cross-examination that it was made. (Tr. 402, 447.)

[42] The Company's attempt to impeach Saxton with his Board affidavit about lying during the July 2 meeting did not detract from the fact that he produced solid proof at that meeting that his license had not expired. (Tr. 217-218, 221, 234, 305.) Neither Thompson, who provided inconsistent testimony and generated unreliable "notes" at some point after the meeting, nor Phillips, who was evasive and nonresponsive in many of her responses, disputed testimony by Saxton and Drayton that Saxton produced a duplicate license on July 2. (Tr. 140-141, 365, 398-399, 617-618, 620, 664, 704; GC Exh. 47.)

[43] The explanation by Thompson, an experienced manager of a regulated interstate transportation company, as to why or how he misinterpreted the information on Saxton's license status on July 2, was simply not credible. (338-340, 345, 352, 616, 621-622, 623, 625, 665; GC Exh. 52.)

[44] Thompson did not dispute this portion of Drayton's testimony. (Tr. 400-401.)

your third major offense in a period of just over eight months. Effective today, July 3, 2014, your employment is terminated.[45]

Even assuming that Saxton had driven with an expired license on June 30, such discipline was unprecedented.[46] Moreover, the letter omitted any reference to the documentary proof provided by Saxton at the July 2 meeting and misconstrued the timeframe (several months earlier) in which Brown reminded Saxton to renew his license.[47]

On July 3, Settles filed a grievance on Saxton's behalf regarding Saxton's termination for driving with an expired license.[48]

K. The Union Files a Charge Over Saxton's July 3rd Termination

On July 3, the Union filed charge 05-CA-123327 with Region 5 alleging that the Company violated Sections 8(a)(3) and (4) by terminating Saxton on July 3 in retaliation for engaging in protected-concerted activities, and filing and participating in charges filed against the Company.[49] On July 3, Region 5 rescheduled the hearing from July 8 to October 6.[50] On July 8, Region 5 served the Company with charge 05-CA-123327.[51]

L. The July Grievance Meetings

On July 8, Settles and Saxton met with Thompson and Phillips to discuss Saxton's July 3 termination. Settles asked whether they were now convinced that Saxton had, in fact, renewed his driver's license on June 4. Philips responded that her copy of Saxton's records indicated only that he received a license on July 1. Saxton then produced copies of his Maryland motor vehicle records indicating renewal on June 4 and issuance of a duplicate license on July 1. However, Phillips and Thompson still refused to budge, maintaining that Saxton was terminated because of his July 2 statement that his license expired. Saxton then explained that he omitted any reference to losing his license because he lost it while visiting Region 5 staff and did not want to divulge such activity. Thompson responded that he and Philips were misled, but Settles rejected that claim, again referring to the documentary proof provided to them prior to terminating Saxton.[52]

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[45] GC Exh. 23.

[46] Although not specified in the letter, Thompson testified that Saxton's "violation of applicable law" was analogous to conduct prohibited in work rule 2(o), which authorizes termination if a driver is convicted of reckless driving or has his license is revoked for any reason. (Tr. 665,667; GC Exh. 3 at 2.) In any event, the Company provided no evidence that a driver has ever been disciplined under such a work rule.

[47] Thompson's representation that Saxton was reminded about the renewal is belied by Brown's testimony that he reminded Saxton several *months* earlier. (Tr. 663, 802.) Moreover, Thompson never changed the discipline to a charge that Saxton knowingly drove his company vehicle on June 30 without a valid license. (Tr. 664.)

[48] GC Exh. 24.

[49] GC Exh. 1(H).

[50] GC Exh. 1(K).

[51] GC Exh. 1(I) at 4.

[52] This finding is based on the testimony of Settles, Thompson and Saxton. (Tr. 149-151, 155-157, 231-232, 449, 498-501, 503, 523-525, 628, 667-668.) Thompson incredibly posited that he learned for the

The July 8 meeting concluded with Thompson still refusing to reinstate Saxton and telling Saxton that he would get back to him. After several attempts by Thompson to set up a meeting with the Union, one was finally scheduled for July 16 to further discuss Thompson's concerns with the "inconsistencies" in Saxton's statements. [53]

Prior to that meeting, however, Thompson attempted to expedite matters without Settles present by approaching Drayton in his truck and urging him to contact Saxton. While still insisting that Saxton admitted at the July 2 meeting that his license expired, Thompson suggested that the three of them meet so Saxton could return to work. Drayton declined to convene such a meeting without Settles present.[54]

On July 16, Saxton, Settles and Drayton met with Thompson and Phillips to discuss Saxton's July 3 termination. Thompson again questioned Saxton about his license. Settles refused to allow Saxton to answer any questions, reiterating his position that Saxton neither permitted his license to expire nor drove a Company truck on an expired license. At Thompson's insistence, Saxton left the room and Thompson sought to have Drayton admit that Saxton said that his license expired during the July 2 meeting. After Drayton denied that Saxton made such an admission, Drayton and Settles got into an extensive discussion about the July 2 meeting. Drayton and Settles concluded by again relying on the fact that Thompson and Philips should have been able to confirm that Saxton's commercial driver's license was renewed on June 4. Thompson and Philips, however, continued to challenge the validity of the information, suggesting that it was either not entirely understandable, vague or possibly falsified. Settles ended the meeting by asking for the Company's written position.[55]

M. The Company Opposes Saxton's Unemployment Benefits Claim

On July 17, one day after the final grievance meeting, Phillips responded to Saxton's claim for unemployment benefits with the Maryland Department of Labor. In her online submission to the state agency, Philips continued to espouse the Company's position that Saxton knowingly drove a Company truck without a valid driver's license.[56]

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first time on July 8 that Saxton had did not driven on an expired license after Settles showed him the Maryland motor vehicle record. Yet, Thompson admitted the information contained in Settles' copy of Saxton's driving record was the same as the information in his July 2 copy of Saxton's driving record. (Tr. 630; GC Exh. 17 at 4; GC Exh. 52.)

[53] While I credit Thompson's undisputed testimony that he attempted to set up earlier meetings on July 9 and 10, I do not credit his hearsay testimony, which continued to conflict with the weight of the credible evidence, that a "vendor" gave him less than certain information as to whether Saxton renewed his license on June 4. (GC Exh. 64; Tr. 632, 635, 668, 673.)

[54] This finding is based on Drayton's credible and undisputed testimony. (Tr. 405-406.)

[55] Drayton conceded that Saxton admitted at the July 2 meeting that his license expired, but did so out of frustration. (Tr. 447.) Otherwise, the testimony by Saxton, Drayton and Thompson about this meeting was fairly consistent. (Tr. 158, 328, 407-411, 505, 509-510, 673; R. Exh. 9.)

[56] Given her testimony and the documentary proof provided to her, Phillips' assertion that Saxton drove a Company vehicle on an expired license was a fabrication. (Tr. 335, 337; GC Exh. 55, 60 at 5-6.) She testified she became convinced Saxton did not drive with an expired license after the July 8 grievance meeting. (Tr. 335-338.) However, after the July 8 and 16 grievance meetings, Phillips gave a different

In a follow-up statement on July 18, Phillips provided the Maryland Department of Labor with additional false statements:

> The clmt's license expired on 6/27/14. That was a Friday. Then he drove without a valid license on Sat. 6/28 and Monday, 6/30. He called on Tuesday and said he would not be in, because he had to renew his license. When he came back on Wed, we interviewed him. At first he admitted it had expired, and he knew it. However, during the course of the investigation, he changed his story to say that he had lost his license, and it hadn't expired.
>
> However, I keep track of all the driver's licenses, and had notified the clmt about a month in advance, that his license was expiring on his birthday, 6/27/14. It is the driver's responsibility to make sure they renew their licenses on time, so I hadn't rechecked to see if he had actually renewed it. When he told us he had to renew it, we realized he had driven for 2 days on an expired license, putting the company at risk, so he was discharged.
>
> We had a meeting with the clmt and the union rep and the clmt proved that his license had been renewed on 6/4/14, as he stated. He had not been driving on an expired license, but three of us in that first meeting with him, when he was terminated, heard him say his license had expired. Then he changed his story and ever since has been saying he had just lost his license.
>
> We are bringing him back to work, effective this next Monday, 7/28/14, as he proved his license had not expired, and we could not prove that he had knowingly driven without a license. I am changing his separation reason to an unpaid suspension, with the rtw of 7/28/2014.
>
> He kept insisting that he had lost his license, and didn't realize it until he had to show it at a security checkpoint, as he told you. He will be brought back to work on 7/28/14, but will not receive back pay for the weeks he was suspended, as we still feel he lied to us about his license being expired.[57]

The Maryland Department of Labor determined that the Company provided insufficient evidence of Saxton misconduct and awarded him unemployment benefits.[58]

N. Saxton's Termination Is Converted to an Unpaid Suspension

On July 23, Thompson reinstated Saxton. The letter, which was addressed to Settles, stated in pertinent part:

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story to the Maryland Department of Labor.

[57] Contrary to the representations in her statement, Phillips testified that she does *not* keep track of truck driver's licenses. Nor did she notify Saxton that his license was expiring. (GC Exh. 60 at 5-6; 328-329, 338, 340-341, 353.)

[58] The State agency's determination, governed by a different standard, has no bearing on the merits of this proceeding. (GC Exh. 54, 60 at 7.)

> By the conclusion of the meeting on July 8, it was not clear, per Richard's changing stories, what actually happened…
>
> We have decided to reinstate Richard effective immediately, and to treat his time off from work as an unpaid suspension, and a major offense, for dishonesty. Although it is now unclear to us whether Richard drove without a license on June 30, it is clear to us that Richard was dishonest during the course of our investigation…[59]

Saxton returned to work on July 23. On July 24, Settles grieved the suspension.[60] On September 10, Region 5 served the Company with a consolidated complaint, compliance specification, and notice of hearing for October 6. In addition to the allegations contained in the previous complaint, the new complaint included allegations relating to the July 3 termination and its reclassification to a suspension on July 23.[61] On September 16, Freedman, Thompson, and Phillips were, once again, subpoenaed by the General Counsel for the upcoming hearing.[62]

O. The September 29 Termination

Between 2:30 and 3:00 p.m. on September 29, Saxton and three coworkers – Leroy Goodman, Harry Bowie and Steve Williams – returned to the facility after completing their delivery routes. Around that time, Thompson instructed Brown to direct Saxton to take a Company truck to be serviced at a nearby repair shop. At that point, the truck had already been parked on the lot with a broken window for six days.[63]

After parking his vehicle, Saxton went to turn in his manifest at the transportation office. As he arrived, Goodman had just turned in his manifest. Saxton did the same and then Brown, sitting about six feet away, asked if Saxton could do him a favor and take a truck to Ryder for window repairs.[64] Saxton told Brown his eight hours were up and he was on overtime. Saxton insisted Brown get a junior driver to take the truck to Ryder. He had a point, since there was no shortage of junior drivers that afternoon. There was no yelling during this initial conversation.[65]

After Saxton declined the request, Brown walked up to Saxton and continued the conversation next to the transportation window. After Brown asked for an explanation, Saxton

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[59] Thompson's assertion that he believed that Saxton lied during the investigation was contradicted by Philips testimony that they were really confused all along. (Tr. 345; GC Exh. 25.)

[60] GC Exh. 26.

[61] GC Exh. 1(L)-(M).

[62] Freedman, Philips and Thompson again conceded knowing that the subpoenaes related to Saxton's discipline. (Tr. 40, 360-361, 568-569.)

[63] I do not credit testimony by Thompson that he suddenly noticed, on a day when no rain was forecast, a damaged window on a vehicle that had been parked on the lot for six days. The credible evidence suggests that they were aware that the other four drivers were completing their shifts around the same time as Saxton. (Tr. 163-164, 603-604, 677-678, 709-710, 787, 804, 829.) Moreover, four other drivers clocked out during the same time period. (GC Exh. 36.)

[64] Brown did not dispute credible testimony by Saxton and Drayton that Goodman arrived around the same time and was present when he turned in his manifest. (Tr. 163-166, 412-414.)

[65] Approximately seven truck drivers were available during the period of time after Saxton finished his regular shift. (Tr. 173-174, 605; GC Exh. 36, 40, 63.)

insisted he had the contractual right to refuse because he was the senior driver and had a right to refuse overtime. He took out the CBA and urged Brown to read it. As Brown and Saxton continued arguing, their voices got progressively louder. Thompson heard the noise and joined Brown in demanding that Saxton take the truck to Ryder for repair.[66] Thompson insisted that Saxton could not refuse the assignment because he was the only driver available.[67] Shortly thereafter, Smith approached and the three supervisors surrounded Saxton. Saxton maintained that, as the senior man, he was entitled under the CBA to refuse overtime work. The incident was witnessed by two warehousemen, David Wallace and Kem Singh, standing 20 and 50 yards away, respectively, who heard Saxton yell, "[n]o, I'm not going to do it!"[68] Thompson told Saxton to punch out and not return the next day. Saxton clocked out at 3:07 p.m.[69]

Saxton clocked-out, walked to the parking lot and, upon seeing driver Dennis Wade, yelled into the warehouse that Wade was available to take the "fucking truck" to Ryder. Thompson did just that and had Wade take the truck to Ryder. Shortly thereafter, Thompson, Wade and Wallace provided Philips with emails describing the incident.[70] Thompson's statement said that Saxton refused the order to take the truck because overtime was not guaranteed. That was inaccurate since Saxton simply refused and insisted that a junior driver be asked to do it.[71]

Drayton, seeing Saxton walking in the parking lot visibly upset, walked up to him and asked what was wrong. Referring to Thompson, Saxton said that "this motherfucker fired me

[66] Thompson's denials that he told Saxton to take the truck to Ryder and then told Saxton to punch out and not to return the following day are undermined by the weight of the credible evidence, the subsequent termination letter, and the Company's position statement. Moreover, Thompson's immediate response to the incident, coupled with the lack of explanation as to why he did not ask a less senior employee to take the truck to Ryder, further confirms his motivation to target Saxton. (Tr. 166-167, 173, 273, 375, 584, 587, 609, 611, 679, 782, 789-790, 804, 806-807; GC Exh. 27, 39, 40 and 46 at 2.)

[67] Thompson was obviously aware that a driver has a right to refuse an overtime assignment when a junior driver is not available. (GC Exh. 59 at 6.)

[68] Although received in evidence as a record allegedly obtained by Phillips in the regular course of business pursuant to FRE 803(6), I gave the statement, which was prepared by Phillips for Wallace a few days before an NLRB hearing, no weight as both unreliable and prepared for the ensuing litigation. (R. Exh. 12-13; Tr. 751-755.) Instead, I rely on my credibility assessment of Wallace's testimony. (Tr. 749.)

[69] The weight of the credible evidence indicates that Saxton and Brown were talking loudly at the outset, followed by Saxton and Thompson yelling after the latter joined the fray. Saxton and Thompson were yelling during much of their heated exchange, so loud that an employee operating heavy machinery nearby heard Saxton's voice. (Tr. 166-167, 171-172, 174, 273, 277, 285, 611, 679-680, 749, 776, 782, 789-790, 804; GC Exh. 27, 34, 39-40, 63.) I found Singh and Wallace credible in their assessments of the loudness of the voices. (Tr. 372-373, 749-750, 765.) I also credit the testimony of Brown that Saxton used profanity. (Tr. 790, 807.) A professed "religious" man and friend of Saxton before the incident, Brown credibly explained the failure to mention that in his written statement. (Tr. 790, 807; GC Exh. 39.)

[70] Smith and Wallace omitted any reference in their written statements to Saxton's use of profanity, but I found their testimony credible with respect to Saxton yelling and cursing during the argument with Thompson. (Tr. 173, 473-475, 606-607, 680, 777; R. Exh. 12; GC Exh. 36, 40, 63.)

[71] I do not place much significance in the fact that Thompson's statement also omitted any reference to Saxton yelling in the transportation office or using profanity. (GC Exh. 4, 39, 63; Tr. 607, 679-680.) There is no doubt that both were yelling. However, Thompson's testimony that he offered to have someone drive Saxton back was not credible. That was omitted from his statement and was inconsistent with the testimony of Brown and Smith.

again." They were approximately 20 yards from the warehouse entrance during at this point. After further discussion, Saxton and Drayton went to Phillips' office. Saxton left to speak with Freedman, while Drayton insisted that Saxton's discharge violated Article 3(D) of the CBA. At that point, Thompson joined the discussion and asked Drayton if he heard Saxton curse at Thompson. Drayton confirmed that Saxton cursed in the parking lot, but then sought to change the discussion back to the applicable CBA provision. Thompson was not interested. Meanwhile, Saxton approached Freedman about the discharge. Freedman was unaware of that development and urged Saxton to discuss it with Thompson. Saxton returned to Philips' office, but Thompson refused to speak with him. At that point, Saxton and Drayton left. Shortly thereafter, Saxton informed Settles of his termination. Settles told Saxton that he would speak with Thompson. Approximately 30 minutes later, Settles told Saxton to return to work the next day.[72]

P. Saxton's October 2 Termination

Saxton returned to work on September 30 and drove his delivery route, which ended after two hours of overtime. As he delivered his manifest to Moore in the warehouse, Brown called out to him. Saxton replied, "[w]hat is that, Mr. Remus?" Brown said that Thompson wanted to see him. Saxton replied that his shift was over and he would not speak with Thompson because he was advised against it by the Union. He clocked-out at 4:43 p.m. and left the facility.[73]

After leaving the warehouse, Saxton found Drayton in the parking lot waiting to carpool home. After telling Drayton that Thompson wanted to meet with him, Drayton noted that Thompson wanted to meet with him as well. Drayton then asked Saxton to wait in the parking lot while he went to meet with Thompson. Drayton returned to the facility and searched for Thompson between 4:45 and 5:00 p.m., but could not locate him. He returned to the parking lot, informed Saxton that Thompson could not be found and suggested they leave. Before doing so, however, Saxton called and spoke with Brown at 5 p.m. Saxton asked Brown if Thompson was around and to confirm that Saxton was working the next day. Brown told Saxton that he had a route the next day, and to tell Drayton that Thompson did not need to see him anymore. During this conversation, Brown did not instruct Saxton to return to the facility to meet with Thompson. The conversation concluded and Saxton and Drayton left.[74]

Thompson, evidently ensconced in his office while Drayton went looking for him, was preparing a paper trail of the earlier incident with Brown. Brown sent Thompson an e-mail at 4:45 p.m. stating, "I told him you needed to talk to him, I don't think he is going to wait, you may want to come out now and catch him." Thompson responded approximately 35 minutes

[72] Saxton, Thompson and Drayton provided fairly consistent testimony regarding the discussions after Thompson discharged Saxton. (Tr. 174-178, 414-417, 422-426, 611-612.)

[73] Notwithstanding Thompson's request that Brown, Moore and Smith provide second, more detailed reports of what Saxton said on September 30, I found their testimony fairly credible regarding Saxton's demeaning reference to a fictional character. (178-182, 293, 302, 307, 738, 741, 769, 771-772, 778, 7809, 791-793; R. Exh. 7-8, 11; GC Exh. 34, 65-66.) Their additional emails were also received pursuant to FRE 803(6) on the representation that it was customary for the Company to obtain such information in similar circumstances. Although considered for the potentially inconsistent nature of the statements considered therein, I did not consider them reliable and, thus, did not accord them any weight.

[74] Brown did not dispute the credible testimony by Saxton and Drayton regarding this conversation. (Tr. 182-184, 186-187, 194, 208, 298, 429, 431-434, 436-437; GC Exh. 65.)

later and instructed Brown to "[p]lease email me exactly what Richard said to you." At 5:23 p.m., Brown responded that he told Saxton that Thompson wanted to talk to him and Saxton responded that his shift was over and would not talk to Thompson because he was advised to refrain from such communication.[75]

On October 1, Saxton had an uneventful work day, which included communicating with Thompson about maintenance issues with his truck. Upon arriving to work on October 2, however, Thompson pulled him aside. Thompson initially indicated that he would wait for Drayton, but then asked another driver, Harry Bowie, to serve as Saxton's representative. In an open setting witnessed by several other drivers, Thompson informed Saxton he was terminated and handed him a termination letter. Saxton replied that Thompson would regret that action, leading Thompson to ask if Saxton was threatening him. Saxton explained that he was merely referring to the upcoming NLRB hearing.[76] The letter, stated, in pertinent part:

> On Monday, September 29th, after you returned from your route, and while you were still on the clock, Transportation Supervisor Ellis Brown asked you to return a truck to Ryder for repair. Although Ryder is only around one mile away from our facility, the truck needed to be transported there, you were the only driver present who was on the clock; and it would have only taken you a few minutes, you refused. I approached you and Ellis while you were refusing to perform this task. I explained to you that we needed you to take the truck to Ryder for us, and that you were the only driver who was at the facility at the time. In response, you began screaming at us that you had seniority and did not have to take the truck. Several times I asked you to calm down, and to reconsider your refusal. You continued yelling that you did not have to do so, that you weren't going to take the truck, all while using profanity. After you refused at least four or five times; I finally told you to punch out and leave.
>
> On Tuesday, September 30, I asked Ellis to direct you to come to speak with me and Meg after you returned from your route. Before making a final decision on how to address your conduct the prior day, we wanted to speak with you to provide you with the opportunity to explain your actions. When Ellis directed you to come to see me, you refused. You punched out, told Ellis that you would not speak with me, and left. On September 29 and 30 you repeatedly refused to follow a supervisor's order, and also engaged in insubordination to management. Work rule 2(h) of the bargaining unit work rules provides that the penalty for "refusal to follow a supervisor's order" is "Termination." Work rule 2(d) provides that the penalty for "insubordination to management" is "Termination" for a 2nd offense. Violations of these work rules are considered "Major Offenses"… Work rule 6(h) provides that the penalty for any combination of two (2) major offenses in an eighteen (18) month period is termination. In your case, the most recent infractions comprise your third major offense in a period of just over ten months. Effective today, October 2, 2014, your employment is terminated.[77]

[75] Thompson did not provide a credible explanation as to why he ignored Brown's suggestion that he catch Saxton while he was still there. (Tr. 595-596.; GC Exh. 65.)

[76] I base this finding on Saxton's credible and undisputed testimony. (Tr. 195-197.)

[77] GC Exh. 27.

Thompson's termination letter added an additional insubordination charge based on Saxton's refusal to meet with Thompson when initially directed to do so by Brown. However, Saxton responded in similar fashion in February 2014 by refusing to attend an impromptu disciplinary meeting without a steward present when Thompson sought to meet with him about a work rule 4(c) violation. On that occasion, Saxton was not disciplined.[78]

After being terminated on October 2, Saxton filed for unemployment benefits with Maryland's Unemployment Insurance Office. The Company opposed the application on the grounds that Saxton's termination resulted from misconduct, but the State agency determined on November 21, 2014 that there was insufficient evidence to support such a finding.[79]

Q. Comparable Prior Disciplines

Prior to Saxton's termination on October 2, the Company disciplined three employees for insubordination during the previous four years. None, however, involved a refusal to work overtime or meet with a supervisor.

On June 6, 2012, James Harley, a truck driver, was issued a final warning for insubordination. Harley refused to go out on delivery and argued with management over the issue. There is no indication that overtime was an issue. On May 2, 2013, Harley was issued another warning for hanging up his Company-issued cellular telephone on Brown while Harley was making deliveries. Although Harley has hung up on Brown several times, this is the first time that he was disciplined for such insubordination. [80]

On June 16, 2011, Billy Little was terminated for refusing Thompson's order to work in the warehouse and threatening to punch him in the face. Despite Little's threat to assault Thompson, Little returned to work.[81]

On June 15, 2010, Al Hamilton was terminated for refusing a supervisor's order to take a Department of Transportation-mandated (DOT) drug and alcohol test.[82]

LEGAL ANALYSIS

I. CONFIDENTIALITY PROVISION

The General Counsel alleges that the Company's conditioning Saxton's reinstatement on his signing of a confidentiality agreement restrained Saxton's Section 7 rights. The Company

[78] It is undisputed that Saxton refused to meet with Thompson and Brown in February 2014, that Thompson requested to speak with Drayton on September 30, and that Thompson did not discipline Drayton for failing to meet with him on September 30. (Tr. 20, 121-122.)

[79] The "fact finding" in the report is a mere compendium of statements submitted by the Saxton, Thompson, Philips, Settles and Brown which are fairly consistent with their testimony. (GC Exh. 59.) In any event, the State agency eventually determined, under standards that are inapplicable in our case, that there was insufficient evidence to support make a finding of disqualifying misconduct. (GC Exh. 53.)

[80] Brown confirmed the nature of Harley's repeated insubordination. (R. Exh. 10 at 1; Tr. 808-809.)

[81] Id. at 2.

[82] Id. at 3.

argues that Section 7 rights can be waived, and that the provision was mutually agreed upon, narrowly tailored and, thus, lawful.

Employees have a well-established right to discuss discipline; therefore, a confidentiality rule, even when individualized, is valid only when the employer's substantial and legitimate business justification outweighs any attending infringement upon the employee's rights. See *Inova Health System*, 360 NLRB No. 135, slip op. at 9, n.16 (2014).

After Saxton informed the Union that he had been presented with a last-chance agreement, the Union contacted the Company, who then proposed to convert Saxton's discipline to a suspension for time served if he signed a confidentiality provision. The Union agreed to consider such a provision. The Company then submitted the agreement quickly and directly to Saxon, however, without the Union's knowledge. Saxton signed the document and returned to work.

The Company offered no business justification for conditioning reinstatement on the confidentiality agreement and it is hard to fathom one. Whether the Company was seeking to keep confidential information relating to how it disciplines employees for causing property damages or refusing to sign a last-chance agreement, it is unclear as to what the agreement accomplished. Saxon caused significant damage to a Company vehicle, was suspended for 4 days and out of work as a result, and subsequently returned to work. As such, to the extent that the agreement sought to preclude Saxton, a steward, from discussing his discipline with coworkers, it infringed on his Section 7 rights and, thus, was facially unlawful. See *Philips Electronics North America Corporation,* 361 NLRB No. 16, slip op. at 3 (2014) (employees have a Section 7 right to share their disciplinary information with coworkers and any rule prohibiting such communication violates Section 8(a)(1) of the Act).

The Company's additional argument that Saxton waived his rights by signing the confidentiality provision also fails.[83] In support of this position, the Company cites well-established law which holds that a union may waive certain rights. See, e.g., *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009); *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956); *Coca Cola Bottling Co. of L.A.*, 243 NLRB 501 (1979). However, the fact that a union may consent to the waiver of Section 7 rights through the collective-bargaining process does not entail that an individual employee may do the same. On the contrary: individual employee-employer agreements cannot waive employees' Section 7 rights. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1 (2014). Under the circumstances, the Company bypassed the Union as an unlawful means by which to achieve a waiver for its unlawful imposition of a facially invalid agreement precluding an employee from exercising his Section 7 rights in violation of Section 8(a)(1) of the Act.

[83] The General Counsel alleges that the Company did not plead in its answer that Saxton waived his Section 7 rights when he signed the confidentiality agreement. (GC Exh. 1(Y) at 2.) However, the Company's second affirmative defense does include a general waiver defense. Although not specifically mentioning the confidentiality agreement, the General Counsel was well aware of the Company's argument relating to Saxton's waiver and the matter was litigated. (Tr. 255.)

II. Discipline Attributable To Saxton's Participation In the Board Processes

The General Counsel alleges that the Company initially discriminated against Saxton by disciplining him because of his participation in Board processes. The Company denies the allegations, refers to Saxton's long history with the Company as a driver and union steward, and insists Saxton misled Thompson and engaged in misconduct warranting disciplinary action.

Discipline allegedly precipitated by participation in Board processes is analyzed under the framework established in *Wright Line*, 251 NLRB 1080 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *Taylor & Gaskin*, 277 NLRB 563, 563 n.2 (1985) (noting application of *Wright Line* framework to 8(a)(4) analysis). That framework provides that the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision. This burden is met by demonstrating protected activity, the employer's knowledge of such activity, and evidence of animus. *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 1 (2015). Establishment that protected conduct was a motivating factor in the employer's decision does not require an additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action. *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 5 n.10 (2014). When the General Counsel has met this standard, the burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employees' activity. Id.

The General Counsel alleges that the Company discriminated against Saxton for his participation in Board processes both by terminating him on July 3 and subsequently converting it to a suspension on July 23. The Company denies any animus and asserts that it reasonably responded to Saxton's evasive behavior. In addition, the General Counsel alleges that the Company discriminated against Saxton for his participation in Board processes by discharging him on September 29 and October 2. The Company denies that Saxton was terminated on September 29 and argues that the October 2 termination resulted from insubordination.

Following Saxton's grievance on December 27, the Union filed charges and amended charges with Region 5 of the NLRB. The Region, in turn, notified the Company of the initial and amended charges on January 27 and March 31, respectively. On April 25, the Region issued a complaint with notice of hearing for July 8. On July 1, Saxton left a message, which was conveyed to Thompson, that he was not coming into work because he had "to get a license." On July 2, Thompson pulled Saxton into a meeting and handed him a written warning for calling out on July 1 without sufficient leave time. The meeting included a heated discussion questioning the validity of Saxton's license, culminating in Saxton providing documentary proof. On July 3, Thompson handed Saxton a letter terminating his employment. After failing, for three weeks to conduct a meaningful investigation, Thompson reinstated Saxton on July 23, stating, "We have decided…to treat his time off from work as an unpaid suspension, and a major offense, for dishonesty." On July 24, following his reinstatement, Saxton grieved his suspension.

The aforementioned disciplinary sequence of events resulted in charges that were included in the consolidated complaint, compliance specification, and notice of hearing for October 6 served on the Company by Region 5 on September 10. A few weeks after receiving

that complaint, and one week before the hearing, on September 29, Thompson targeted Saxton with an overtime task that Saxton refused based on the CBA and which led to his termination on October 2. The fact that Saxton was told to return to work on September 30 after Settles intervened with Thompson is of no consequence since Thompson never retracted his statement to Saxton to clock out and not return. It was a temporary reprieve while Saxton prepared a termination letter.

The record establishes that the Company was well aware of Saxton's grievances, the accompanying complaints and notices of hearing. In at least two instances, the Company disciplined Saxton less than a week prior to a scheduled hearing: first, Saxton was disciplined on July 3 prior to a hearing scheduled for July 8; second, Saxton was disciplined on September 29 prior to a hearing scheduled for October 6. This suspicious timeline of events raises a strong inference that the Company exhibited discriminatory animus toward Saxton's participation in Board processes. See *Success Village Apartments*, 348 NLRB 579, 579 n. 5 (2006).

Pretext evidencing animus is initially demonstrated by Thompson's decision to seize upon secondhand information to initiate an investigation of Saxton's license and then continuing to favor such secondhand information even in the face of clear documentary evidence to the contrary. See *Clinton Food 4 Less*, 288 NLRB 597 (1988). This failure to evenhandedly investigate the charges against Saxton is further demonstrated by the Company's failure to adduce evidence of past discipline for similar allegations. See *Golden State Foods Corp*., 340 NLRB 382, 385 (2003).

Second, the Company's shifting reasons for disciplining Saxton, by first accusing him of driving a Company vehicle on an expired license and then accusing him of dishonesty, strongly suggests that the July 23 suspension was a recalibration based upon pretext. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999).

Third, the grounds advanced by Thompson for terminating Saxton on September 29 and October 2 were contrived. Thompson knew or should have known on September 29 that there were approximately 7 junior drivers available at or around the time that he and Brown directed Saxton, the senior driver and on overtime, to take a truck for repairs. Thompson suddenly made this decision after the truck had already been parked on the lot for nearly a week. He ignored the applicable CBA rule as Saxton tried to show it to him and, instead, engaged Saxton in a shouting match which included profanity from Saxton during the argument, as well as a short time later when he yelled into the warehouse. The other basis for discharging Saxton – refusing to meet with Thompson on October 2 as directed by Brown – was also baseless. Saxton initially insulted Brown with the "Mr. Remus" comment and refused to meet with Thompson in the absence of union representation. However, a short time later, Drayton went looking for Thompson and Saxton called Brown. However, Thompson decided at that point to lay low, avoid further communication with Saxton and Drayton, and begin a paper trail of the earlier instance of insubordination by Saxton.

Since the General Counsel met his burden of establishing that Saxton's termination and suspensions were directly motivated and caused by his participation in Board processes, the burden shifted to the Company to demonstrate that Saxton would have been terminated in the absence of such conduct. However, there was no such showing. Prior to Saxton's termination on

October 2, the Company disciplined three employees for insubordination during the previous four years. One employee, after repeated instances of insubordination, received a warning. Another employee was initially terminated for refusing work and threatening to assault Thompson, but was reinstated. The third employee was terminated for refusing a State-mandated drug and alcohol test. None of these instances come close to a contractually justified refusal to work overtime or meet with a supervisor without a union represent present.

Considering the suspicious timing, the conclusory investigation, the lack of previous similarly situated discipline, and the shifting justifications provided, the evidence demonstrates that the Company discriminated against Saxton for participating in Board processes in violation of 8(a)(4) and (1).

III. DISCIPLINE RESULTING FROM SAXTON'S PROTECTED CONCERTED ACTIVITIES

The complaint includes overlapping charges alleging that the Company also discriminated against Saxton for engaging in protected concerted activity by discharging him on September 29 and October 2. The specific activity alleged is his refusal to take an overtime assignment based on his seniority rights under the CBA.

Employees have the right to engage in concerted activities for the purpose of mutual aid or protection. See *Eastex v. NLRB*, 437 U.S. 556, 563 (1978) (quoting Section 7, 29 U.S.C. § 157). The concepts of concerted activity and mutual aid or protection are analytically distinct. See *Summit Regional Medical Center*, 357 NLRB No. 134, slip op. at 3 (2011). Concertedness refers to the manner of the act, while mutual aid or protection refers to its goal. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). An activity is concerted when conducted "with or on the authority of other employees and not solely by and on behalf of the employee himself." *Myers Industries*, 268 NLRB 493, 497 (1984) (*Myers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). An activity is for mutual aid or protection when it seeks to "improve terms and conditions of employment or otherwise improve [employees'] lot as employees." *St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 4 (2014) (quoting *Eastex*, 437 U.S. at 565). Analysis of whether activity is concerted for mutual aid or protection is objective. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4.

An individual activity is conducted with or on the authority of other employees when seeking to initiate or prepare for group action, or when bringing truly group complaints to the attention of management. See *Myers Industries*, 280 NLRB 882, 887 (1986) (*Myers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). An individual employee's invocation of a collective-bargaining agreement in support of a reasonable and honest refusal to perform a requested task is concerted activity. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984).

On September 29, Brown asked Saxton to take a truck for window repairs. Saxton told Brown he was in overtime and insisted Brown assign the task to a junior driver. Brown left the transportation office, walked up to Saxton and continued the conversation next to the transportation window. Saxton insisted he had the contractual right to refuse because he was the senior driver and on overtime. He took out the contract and urged Brown to read it.

Notwithstanding any debate over the accuracy of his interpretation, Saxton's invocation of the contract demonstrated a reasonable and honest refusal to perform the requested task and was thus a concerted activity. See *White Electrical Construction*, 345 NLRB 1095, 1095 (2005); *Tillford Contractors*, 317 NLRB 68, 68-69 (1995).

As Brown and Saxton argued about the assignment, their voices got progressively louder. Thompson and Smith joined the argument and the three supervisors surrounded Saxton. Saxton reiterated his interpretation of the contract, lacing his refusal to do the task with profanity. In the end, Thompson told Saxton to punch out and not return the next day.

Discharge for conduct that is part of the res gestae of protected concerted activities is unlawful unless such conduct is sufficiently egregious to remove it from the protection of the Act. See *Aluminum Co. of America,* 338 NLRB 20 (2002). Activity is not protected when "so violent or of such serious character as to render the employee unfit for further service." *St Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-05 (quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946)). Analysis of the character of conduct examines: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

With respect to the place of discussion, the incident took place both inside and outside the transportation office and within hearing distance of other employees. The discussion therefore was not private, a factor which counsels against protection; however, this factor carries less weight given that the Company selected the setting of the confrontation. See *Brunswick Food & Drug*, 284 NLRB 663 (1987).

The subject matter of the discussion entailed Saxton's interpretation of and reliance upon a contractual right. Discharge for activity which is itself concerted is in and of itself unlawful to the extent such activity has not lost its protected status. See *Atlantic Scaffolding Co*., 356 NLRB No. 113, slip op. at 5 (2011).

As to the nature of Saxton's outburst, he yelled and cursed at least several times during his shouting match with Thompson. Outbursts lose protection when they "exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.,* 205 NLRB 51, 51-52 (1973). Thus, impulsive outbursts carry more protection than those which are planned. See *Kiewit Power Constructors Co.*, 355 NLRB No. 150, slip op. at 4 (2010). In this regard, profanity is typically evaluated not for its content, but rather for its quantity. See *Daimler Chrysler Corp.*, 344 NLRB 1324, 1329-1330 (2005). Moreover, raising one's voice does not render concerted activity unprotected. See *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 3 (2011). Under the circumstances, with Saxton and Thompson both yelling in the midst of a warehouse populated by a relatively small number of employees towards the end of the work day, I do not find that Saxton's inclusion of profanity raised his yelling to a level sufficient enough to render his concerted activity unprotected.

As to whether the outburst was provoked, Saxton responded to a directive which he believed contravened his interpretation of the contract. However, there is no allegation that Thompson's directive was, in and of itself, unlawful. Thus, this factor counsels against protection. See *Tampa Tribune*, 351 NLRB 1324, 1325 (2007). On the other hand, the fact that Saxton's outburst was elevated in response to a display of overt hostility, as he was surrounded by three supervisors, counsels against placing too much emphasis upon this factor. See *Felix Industries*, 339 NLRB 195, 195-96 (2003).

Although Thompson's directive was not unlawful, the location of the incident was controlled by the Company and the subject matter went directly to the terms and conditions of employment. Under the circumstances, the impulsiveness, profane nature and volume of Saxton's discourse did not cause him to lose the protection of the Act and his discipline by the Company for engaging in protected concerted activity also violated 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. The Respondent, S. Freedman & Sons, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by conditioning Richard Saxton's reinstatement on a waiver of his Section 7 rights to discuss discipline, grievances and settlements with coworkers on November 25, 2013.

4. The Company violated Section 8(a)(3) and (1) of the Act by terminating Saxton on September 29 and October 2, 2014 for engaging in protected concerted activities.

5. The Company violated Section 8(4) and (1) of the Act by terminating Saxton on July 3, 2014, suspending Saxton on July 23, 2014, and terminating Saxton on September 29 and October 2, 2014, for filing or participating in charges and proceedings with the National Labor Relations Board

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged, and suspended Richard Saxton, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Tortillas Dan Chavas,* 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[84]

ORDER

The Company, S. Freedman & Sons, Inc., Landover, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Discharging or otherwise discriminating against any employee for supporting the Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters or any other union.

Suspending, discharging or otherwise discriminating against any employee for participating in charges relating to or proceedings before the National Labor Relations Board.

Suspending, discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

Restricting employees' Section 7 rights by prohibiting them from discussing their disciplines, grievances, and settlements.

Coercing employees by conditioning their reinstatements on waivers of Section 7 rights, including the right to discuss disciplines, grievances, and settlements.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of the Board's Order, offer Richard Saxton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[84] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Make Richard Saxton whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and suspension, and within 3 days thereafter notify the employee in writing that this has been done and that the discharges will not be used against him in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Landover, Maryland copies of the attached notice marked "Appendix."[85] Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 2, 2014.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. March 31, 2015

Michael A. Rosas
Administrative Law Judge

85 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend or otherwise discriminate against any of you for supporting Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters or any other union.

WE WILL NOT discharge, suspend or otherwise discriminate against any of you for seeking assistance from, or cooperate in investigations or proceedings conducted by, the National Labor Relations Board.

WE WILL NOT discharge, suspend or discipline employees because they exercise their right to bring issues and complaints to us on behalf of themselves and other employees.

WE WILL NOT require that you keep confidential your disciplines or the terms of grievance settlements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Richard Saxton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard Saxton whole for any loss of earnings and other benefits resulting from his discharges, and suspension, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Richard Saxton for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, and suspension, of Richard Saxton, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharges will not be used against him in any way.

S. FREEDMAN & SONS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-121221 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.